

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:07-cv-10066-MLW

4
5
6 VINCENT De GIOVANNI, on behalf of himself and all other
7 similarly-situated individuals,
8 Plaintiffs

9 vs.

10 JANI-KING INTERNATIONAL, INC., et al,
11 Defendants

12 *****

13 For Hearing Before:
14 Chief Judge Mark L. Wolf

15 Status Conference

16
17 United States District Court
18 District of Massachusetts (Boston)
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Monday, March 1, 2010

22 *****

23 REPORTER: RICHARD H. ROMANOW, RPR
24 Official Court Reporter
25 United States District Court
One Courthouse Way, Room 5200, Boston, MA 02210
bulldog@richromanow.com

A P P E A R A N C E S

HILLARY A. SCHWAB, ESQ.
SHANNON E. LISS-RIORDAN, ESQ
Lichten & Liss-Riordan, P.C.
100 Cambridge Street, 20th Floor
Boston, Massachusetts 02114
(617) 994-5800
Email: Hschwab@llrlaw.com
For plaintiffs

AARON D. van OORT, ESQ.
KERRY L. BUNDY, ESQ.
Faegre & Benson, LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-3901
(612) 766-7000
Email: Avanoort@faegre.com

and

GREGG A. RUBENSTEIN, ESQ.
Nixon Peabody, LLP
100 Summer Street
Boston, Massachusetts 02110-2131
(617) 345-6184
Email: Grubenstein@nixonpeabody.com
For Defendants

1 P R O C E E D I N G S

2 (Begins, 2:00 p.m.)

3 THE CLERK: Civil Action 07-10066, Vincent De
4 Giovanni, et al versus Jani-King International,
5 Incorporated, et al. The Court is in session. You may
6 be seated.

7 THE COURT: Good afternoon. Would counsel
8 please identify themselves for the Court and for the
9 record.

10 MS. SCHWAB: Good afternoon, your Honor,
11 Hillary Schwab appearing on behalf of the plaintiff, and
12 with me is Shannon Liss-Riordan.

13 MR. van OORT: Good afternoon, your Honor.
14 Aaron van Oort on behalf of Jani-King, and with me is
15 Kerry Bundy and Gregg Rubenstein.

16 THE COURT: Okay. This case, as I understand
17 it, was originally assigned to Judge Lindsay and then
18 handled up to a point by Judge Young and, as you now,
19 now it's been assigned to me. I want to try to get it
20 on track.

21 We've studied the submissions and I think if I let
22 you know what some of my specific questions are, it will
23 get me to the starting line on a more informed basis,
24 and then I'm interested, of course, in hearing from each
25 of you as to how we ought to proceed. But I didn't see

1 an order in the file appointing class counsel in
2 connection with the class certification that Judge Young
3 ordered. Has there been such an order?

4 MS. SCHWAB: There hasn't been an explicit
5 order, although the class certification motion proposed
6 us as the as-counsel and the motion was granted. But
7 there wasn't a specific definition on it.

8 THE COURT: Okay. I think that probably has
9 to be memorialized or decided.

10 And then the defendants made a motion to stay the
11 proceedings because of a possible interlocutory appeal,
12 but as I understand, the First Circuit has declined to
13 hear an interlocutory appeal, is that correct?

14 MS. SCHWAB: That's correct.

15 MR. van OORT: Your Honor, that's correct.
16 That was one of three reasons why we asked to stay or
17 defer decision on the summary judgment ruling as to the
18 class. I'm not going to address the other two reasons
19 at this point --

20 THE COURT: Not right this minute. I'm just
21 trying to see if I've got the facts right.

22 MR. van OORT: Yes, your Honor.

23 THE COURT: Then I think there's a question
24 about the status of the claims that were in the first
25 amended complaint that aren't in the second amended

1 complaint. Some clarification, I think, would be
2 helpful, certainly to the defendants, as to whether the
3 omitted claims should be regarded as dismissed with
4 prejudice. I think they're some of the Chapter 93(a)
5 claims that Judge Young decided, with prejudice, should
6 not be certified?

7 MS. SCHWAB: Your Honor, what happened was
8 after Judge Young's order granted us leave to amend, we
9 amended and omitted the common law claims that he had
10 denied class certification on and focused our 93(a)
11 claim on the excessive fees issue. And we have
12 communicated with defense counsel on this. That we are
13 prepared to dismiss with prejudice the common law claims
14 that aren't part of the current complaint. And so as to
15 the defendants' summary judgment motion, which just
16 focused on the common law claims, that motion is no
17 longer live.

18 THE COURT: Were there some Chapter 93(a)
19 claims that are not in the second amended complaint as
20 well?

21 MS. SCHWAB: Um, the Court focused its -- we
22 didn't explicitly -- we had not broken up different
23 types of 93(a) claims, so I wouldn't be prepared, at
24 this point, to say that there are any 93(a) claims that
25 we've withdrawn with prejudice.

1 As to the class certification motion that's
2 pending before your Honor, the renewed motion, that is
3 limited in scope to the class claims that Judge Young
4 dismissed without prejudice, the excessive fees claim.

5 THE COURT: And does that resolve one of the
6 defendants' concerns?

7 MR. van OORT: Yeah, it does. There are still
8 two arguments live in our motion for individual partial
9 summary judgment against one of the named plaintiffs
10 because --

11 THE COURT: And we're going to get to them.

12 MR. van OORT: Okay. But as to the common law
13 claims, we agree, and we were very glad to hear that
14 those were dismissed with prejudice.

15 THE COURT: All right. Then -- well, there's
16 also some Chapter 93(a) theories that are, in effect,
17 dismissed with prejudice as well, those that aren't
18 reasserted here.

19 MR. van OORT: Um, yes, I understood
20 Ms. Schwab to say that the plaintiffs were not agreeing
21 that those theories were dismissed with prejudice?

22 THE COURT: I think they're not agreeing that
23 their fees and refund theories should be dismissed with
24 prejudice, but if there were other 93(a) claims that
25 Judge Young didn't certify a class on -- and I'm just

1 trying to get this clarified, that those can be
2 regarded, I thought she said, as dismissed with
3 prejudice.

4 MS. SCHWAB: No -- well, we haven't sought
5 class certification again on the claims that were
6 dismissed with prejudice, the 93(a) claims. Now,
7 depending on what happens, we still have those claims in
8 there for the individual plaintiffs. But as I expect of
9 the discussion we'll get into today, the employment
10 claims and the 93(a) claims are pled in the alternative
11 and because of the stage in the proceedings, it's
12 possible that those -- that all the 93(a) related
13 motions would be moot if the Court -- well, depending on
14 when and what the Court's decision was on the employment
15 misclassification claims.

16 THE COURT: All right. Now, as I understand
17 it, there were two Chapter 98(3)(a) theories that Judge
18 Young declined to certify a class on, but without
19 prejudice, because he found that the named plaintiffs --
20 well, he didn't have evidence showing that the named
21 plaintiffs were adequate because he didn't have evidence
22 showing that they had suffered the kind of loss that the
23 theory asserted occurred.

24 In the proposed or the second amended complaint --
25 um, the second amended complaint seeks class

1 certification again on the fees claim, I believe, is
2 that correct?

3 MS. SCHWAB: That's right. Well, that's the
4 -- the renewed motion for class certification seeks
5 certification on the fees claim and the fees have to do
6 with the excessive fees that are charged to every
7 franchisee, whereas the refunds issue, that was
8 something that would occur in a particular circumstance
9 and it wasn't a circumstance that arose as to the lead
10 plaintiffs. So that's not part of the renewed class
11 certification motion.

12 THE COURT: All right. And what you've done,
13 if I read the submission right, is provide evidence or
14 argument concerning the original named plaintiffs on the
15 Chapter 93(a) fees claim and you add four other
16 plaintiffs who you say were similarly situated and, like
17 everybody else, were charged excessive fees?

18 MS. SCHWAB: That's right, and we submitted
19 just the franchise agreements and the franchise monthly
20 statements that show the fees being deducted as to all
21 of those proposed lead plaintiffs.

22 THE COURT: All right. And does the defendant
23 still contend that, with these clarifications, for
24 example, as to what's been dismissed with prejudice,
25 that class certification -- that leave of court is still

1 necessary for the second amended complaint to be filed
2 and to become the operative document?

3 MR. van OORT: No, your Honor, that resolves
4 our concerns.

5 THE COURT: All right. And do you expect to
6 be contesting whether there should be class
7 certification now on the fees claim now that additional
8 evidence has been provided to support the request for
9 class certification on that theory?

10 MR. van OORT: Yes, we do expect to oppose
11 that, your Honor.

12 THE COURT: All right. And then with regard
13 to the other Chapter 93(a) theories to which I
14 understand Judge Young denied class certification
15 without prejudice, the refund theory is -- as I
16 understand it, there's no motion for class certification
17 on that theory now, is that correct?

18 MS. SCHWAB: That's correct, your Honor.

19 THE COURT: And do you have a plaintiff that
20 you say suffered that kind of loss?

21 MS. SCHWAB: No, none of the six lead
22 plaintiffs suffered that particular refund loss.

23 THE COURT: And you've asked for discovery, I
24 think, on that claim, is that right?

25 MS. SCHWAB: We have not been provided with

1 discovery on that on a class-wide basis. The only
2 discover that we've been provided is as to the lead
3 plaintiffs. So as to the plaintiffs, both the original
4 two and the four added, we have that discovery, but not
5 as to --

6 THE COURT: Are you requesting discovery
7 relating to the refund theory on a class basis?

8 MS. SCHWAB: As part of the class discovery,
9 yes, I expect that we would pursue that.

10 THE COURT: Okay. All right. And is that one
11 of the things the defendant opposes?

12 MR. van OORT: Yes, your Honor, part of our
13 motion to dismiss the 93(a) claims specifically
14 identifies that refund claim and we ask the Court to
15 dismiss this because no plaintiff has pled facts in
16 support of it.

17 THE COURT: All right. The plaintiff has a
18 motion for partial summary judgment, but it seems to me
19 you didn't have a common understanding as to whether
20 that motion was being brought just on individual claims
21 or, as the defendants seem to perceive it, on behalf of
22 the whole class. The way I read it and understood it,
23 perhaps misunderstood it, the plaintiffs were just
24 asserting -- were just seeking partial summary judgment
25 on individual claims, not on class-wide claims?

1 MS. SCHWAB: Well, your Honor, the timing of
2 everything, it all happened pretty close together. We
3 moved for class certification and the class
4 certification motion was granted in September and the
5 deadline for summary judgment, the deadline that had
6 always -- or for several months had been in place for
7 summary judgment was October 1st. So at the time we
8 moved for summary judgment, the class had been certified
9 on that claim, on the employment misclassification
10 claim.

11 Um, your Honor, I think, coming into today,
12 looking at the different motions that are pending before
13 the Court, our focus is that given that the case is
14 farther along as to the employment misclassification
15 claims, the judge has granted class certification as to
16 those claims, and given that those claims are pled in
17 the alternative to the 93(a) claim, it's our position
18 that it makes sense for the Court to hear the summary
19 judgment motion first, um, we would posit, on a class-
20 wide basis, but in the alternative it could be
21 considered even just as to the individual-named
22 plaintiffs.

23 If the Court were to grant that motion, um, it
24 might lead to the -- if it were granted on a class-wide
25 basis, it would lead to a withdrawal of our motion for

1 class certification on the 93(a) claim. We wouldn't
2 pursue the 93(a) claims because, of course, under
3 Massachusetts law, we couldn't, we would just go forward
4 on a trial of damages on the 148(b), the employment
5 misclassification claims. Alternatively, if the Court
6 were to issue a ruling on the 148(b) claims, either as
7 to the individuals or highlighting the factual issues
8 for trial, that would, in my opinion, put us in the best
9 position to talk seriously about resolution of the case
10 with the defendants. I mean, we're at a cross-roads
11 here where we're either committing to 148(b) or
12 committing to 93(a), depending on the Court's ruling.

13 THE COURT: Why couldn't you proceed on both?

14 MS. SCHWAB: Well, we could if the Court were
15 not to grant -- if the Court were to grant us summary
16 judgment as to liability, that would be a finding that
17 their employees -- at that point we could not pursue the
18 93(a) claims. We would have to go forward under 148(b).

19 THE COURT: Why is that? I just haven't got
20 into the underlying law.

21 MS. SCHWAB: The way 93(a) works is that under
22 Massachusetts law, you can only bring a 93(a) claim on
23 behalf of a "consumer," broadly defined. But
24 Massachusetts courts are explicit that you cannot bring
25 93(a) claims on behalf of employees. We concede that

1 point. And so the pleadings were in the alternative.

2 If they're employees, they have no 93(a) claim,
3 but the scope of damages under both claims, as
4 encapsulated in Judge Young's order, would be
5 comparable. So if the Court made a determination that
6 they're employees, that's it, we go under 148(b) and the
7 93(a) motions would be moot.

8 THE COURT: And the motion for partial summary
9 judgment addresses largely claims that were drawn in the
10 second amended complaint, it seems, the common law
11 claims?

12 MS. SCHWAB: The defendants' motion?

13 THE COURT: I thought it was your motion?

14 MS. SCHWAB: No, the defendants made a motion
15 for summary judgment as to the common law claims.

16 THE COURT: I see.

17 MS. SCHWAB: But the plaintiffs' motion is
18 just the 148(b) employment misclassification claim.

19 THE COURT: All right. Well, I always like to
20 start by telling you what my tentative views are, and
21 they're particularly tentative here because I'm trying
22 to catch a moving train. These clarifications are
23 helpful, but my tentative thoughts are essentially as
24 follows.

25 I feel I -- it is probably most appropriate to

1 complete class certification and to deal with the motion
2 to dismiss the two 93(a) claims. That -- well, that is
3 sort of a corollary of the class certification motion, I
4 think.

5 I'm inclined, with regard to the fees claim, to
6 focus only on the adequacy of the named plaintiffs. Now
7 there's additional information. I'm not inclined, under
8 the law-of-the-case doctrine, to go back and relitigate
9 everything that Judge Young decided in favor of the
10 plaintiffs.

11 With regard to the so-called "refund claims," um,
12 I'm not inclined to certify those. I -- there's no
13 additional evidence, as I understand it now on that, and
14 I don't -- well, the idea of a class action, at least
15 theoretically, you know, is that some injured individual
16 goes and finds a lawyer, not that the lawyer, through
17 discovery, anyway, goes out and finds some allegedly
18 injured individual.

19 I'm inclined to deny the pending summary judgment
20 motions without prejudice to have notice and an
21 opportunity to opt out be sent to the class, as it's
22 finally certified, to simultaneously proceed toward the
23 completion of discovery on all claims. I ordinarily
24 wouldn't hear a motion for summary judgment -- well,
25 frequently I wouldn't hear a motion for summary

1 judgment, particularly over the defendants' or the
2 plaintiffs' objection, um, until the end of all
3 discovery. And the present posture of this case
4 involves some of the more conventional concerns that
5 class members shouldn't know in advance whether
6 liability is going to be established or not, they should
7 know they're in the class and make a decision as to
8 whether to stay or to opt out.

9 Now, in cases like this, though, I have done
10 summary judgment on something of a test basis and, in
11 certain cases, on an individual basis, but I think where
12 I did that most recently, in **DePianti**, the defendant was
13 asking that that be done.

14 So my very tentative thinking is that I will have
15 -- um, I will decide the scope of the class
16 certification, have notice sent out, complete discovery
17 on all the claims, and will address summary judgment if
18 that's an appropriate motion for any party to file when
19 discovery's complete, and also, sometime today, talk to
20 you about some process for trying to settle the case.

21 So with those tentative thoughts, I don't know
22 which of you wants to go first.

23 MS. SCHWAB: Well, your Honor, I just, um -- I
24 would ask the Court to consider, on this issue of
25 148(b), um, in comparison to Chapter 93(a), which I

1 understand the Court did not focus on in thinking about
2 the schedule for the case, that if the Court were to --
3 I urge the Court to consider the summary judgment motion
4 on 148(b) first either as to the individual lead
5 plaintiffs, which is something that could be done
6 regardless of the class certification issues, or as to
7 the class.

8 This case doesn't present the typical one-way
9 intervention problem cited by the defendants because
10 this isn't an issue of them -- of class members hanging
11 back and seeing if this is a case that's going to get
12 thrown out or a case that's going to go forward. The
13 question is, is there going to be a trial on liability
14 and damages or is there going to be a trial just on
15 damages? It's not a typical one-way intervention issue
16 and it really, I think, just comes down to a case-
17 management issue with the Court.

18 THE COURT: Well, why is that? The defendants
19 think they're going to win on summary judgment on
20 liability.

21 MS. SCHWAB: They didn't move for summary
22 judgment yet.

23 THE COURT: Well, they haven't moved yet.

24 MS. SCHWAB: They --

25 THE COURT: I mean, tell me, but I -- I mean,

1 different judges, I know, operate in different ways. If
2 you saw my standard scheduling order, you'd see that
3 there are no motions for partial summary judgment or for
4 summary judgment before the end of discovery without
5 leave of court.

6 MS. SCHWAB: And, your Honor, the deadline
7 passed for the parties to file motions for summary
8 judgment last October, but they did choose to file a
9 motion for partial summary judgment on the common law
10 claim, and since then they chose to file a motion to
11 dismiss on the 93(a) claims. They've never filed a
12 motion for summary judgment nor did they oppose our
13 motion for summary judgment as a cross-motion.

14 THE COURT: What does -- there's a Rule 56(f)
15 request that's been made, I think, by the defendants?

16 MS. SCHWAB: Well, in their emergency motion
17 for a stay, which was now filed four months ago, so to
18 the extent that they requested discovery in that motion,
19 it hasn't been pursued. But, in any event, in that
20 motion they raised the 56(f) issue as to the 148(b)
21 employee misclassification claims. However, if you look
22 at our motion and their opposition to our motion, in our
23 motion for summary judgment, we're relying only on
24 information that's in Jani-King's possession.

25 The central focus -- there are three prongs of the

1 employment misclassification statute and all three of
2 which have to be met in order for a company to meet its
3 burden to classify its -- to classify itself as
4 independent contractors. Under Prong 2 --

5 THE COURT: What are the three prongs?

6 MS. SCHWAB: The three prongs? The first is
7 the individual is free from control and direction in
8 connection with the performance of the service. Prong
9 2, the service is performed outside the usual course of
10 business of the employer. 3, the individual is
11 customarily engaged in an independently-established
12 trade or occupation.

13 Focusing on Prong 2, first, the usual course of
14 business of the employer, the only issue for that prong
15 is what is the usual course of business of Jani-King?
16 We've presented their own representations both to
17 clients and potential clients on their websites and the
18 documents that they put forward to the cleaning clients
19 that they solicit in which they say, "We're the world's
20 largest cleaning company." The work that's performed by
21 these so-called "franchisees" is that cleaning work and
22 without the work of the franchisees, the company
23 wouldn't exist. The only purpose of the company is to
24 provide these cleaning services.

25 Now, Jani-King says, "No, we're not a cleaning

1 company, we're a franchise company that sells cleaning
2 franchises," and this is the exact argument that has
3 been rejected by other Massachusetts courts that have
4 granted summary judgment for plaintiffs. There was a
5 case against Eastern Connection Courier Company where
6 they classified their couriers as independent
7 contractors and they said, "We're not a courier company,
8 we're a marketing logistics company," but the Court saw
9 the company for what it was. It employed couriers. It
10 sold courier services to customers. It wouldn't exist
11 without courier services provided by its so-called
12 "independent contractors."

13 Similarly, there was a case, **Suavez vs. King**
14 **Arthur's Lounge**, and in that case the -- it was a case
15 brought on behalf of exotic dancers. And in that case
16 the company said, "We're a bar. It just happens that
17 there are some exotic dancers here, but really we're all
18 about selling alcohol. It just happens that there are
19 exotic dancers here." And again the Court saw the
20 company for what it was and said, "No, the usual course
21 of business of this company is to be a strip club and
22 the strippers, the exotic dancers, are performing the
23 work in the usual course of business," and they granted
24 summary judgment under 148(b).

25 Um, the Prong 3, the individual is customarily

1 engaged in an independently-established trade, this
2 prong was considered by the Mass. SJC in a case
3 involving Coverall, which is another cleaning franchise
4 company that we have a similar case pending against,
5 similar also to the **DePiante v. Jan-Pro** case. In that
6 case the Court found for purposes of granting
7 unemployment insurance to a so-called "franchisee," that
8 the worker had performed work -- that was customarily --
9 that was not customarily engaged in an independently-
10 established trade, the only work that she performed was
11 for Coverall.

12 Now, as we explained in our briefing here, Jani-
13 King has a noncompete. If you do work for Jani-King,
14 you cannot do work for any other company. And Jani-King
15 reports, "Well, we encourage them to grow their
16 business." But any growth of an individual franchisee's
17 business is also a growth of Jani-King's business. So
18 if you get a new client, it becomes Jani-King's client
19 and Jani-King continues to deduct the same fees that it
20 would deduct from a client that Jani-King solicits for
21 you.

22 So just by the fact that they have this
23 noncompete, you can't do work outside of Jani-King's
24 business. So under Prong 3, just based on the way Jani-
25 King is structured, looking at its own documents, the

1 plaintiff should be entitled to summary judgment.

2 THE COURT: The -- well, it's just a
3 consequence of this having been through three judges,
4 because if this had been my case, you wouldn't have had
5 a deadline for completing discovery ordinarily until
6 after class certification was decided, but was there a
7 deadline for completing all discovery established by
8 Judge Lindsay or Judge Young?

9 MS. SCHWAB: There was a discovery deadline
10 put into place, but I think both parties agree that,
11 with the class certification order occurring after the
12 close of discovery, that there's necessarily some
13 additional class-wide discovery. But, your Honor, on
14 that point --

15 THE COURT: Yes. And you may have anticipated
16 the question, but we could be sure of that, so I'll
17 express it, but, um, the thing I'm wrestling with is why
18 should I have you brief and invest time in deciding a
19 summary judgment motion before all discovery is
20 complete?

21 MS. SCHWAB: Well, your Honor, the only
22 discovery that would go on, at this point, would be --
23 well, there's no discovery that's necessary for our
24 motion. We filed our motion based on Jani-King's own
25 representation and how it does its business. If the

1 Court looks at that motion and says, "Well, you know,
2 there are really fact issues here," then the case would
3 go to trial on the 148(b) claim. We relied on Jani-
4 King's own documentation and its own business structure
5 and that's all that the Court needs to look at to
6 determine summary judgment on that claim.

7 The reason, though, that we're proposing that the
8 summary judgment motion be heard first is because it's
9 by far the most efficient for us. It would potentially
10 moot out the two other substantive pending motions, the
11 renewed class cert. motion, and Jani-King's motion to
12 dismiss. And additionally, as to the --

13 THE COURT: Jani-King's motion to dismiss
14 what?

15 MS. SCHWAB: Jani-King's motion to dismiss the
16 second amended -- the 93(a) claims in the second amended
17 complaint, which focuses only on 93(a). If the Court
18 were to say, "No class discovery should go forward
19 first," then Jani-King would be obligated to produce to
20 us the files of every single franchisee who's performed
21 work in Massachusetts during the statutory period and
22 all of its clients in Massachusetts.

23 THE COURT: You say if no discovery, they
24 would have to give you this?

25 MS. SCHWAB: No, if we went forward with the

1 scheduling that the Court was just discussing where we
2 do class discovery prior to ruling on the substantive
3 motion, that would be an incredibly voluminous and
4 burdensome discovery production on the part of Jani-
5 King. Whereas if the Court makes this determination as
6 to the 148(b) claim, and we submit you have all the
7 information before you to do that, the motions would
8 potentially be mooted out, the parties would be in
9 position to know exactly what the scope of this case is,
10 what a trial would look like, and could roll up their
11 sleeves and see if they could resolve the case at that
12 point prior to engaging in all of this expensive and
13 voluminous discovery.

14 THE COURT: And Judge Young certified the
15 class on the 148(b)?

16 MS. SCHWAB: On the 148(b) employment
17 misclassification, yes.

18 THE COURT: So you say that's ripe for
19 resolution on a class-wide basis?

20 MS. SCHWAB: Yes. Um, your Honor, I just
21 wanted to --

22 THE COURT: Well, do you understand the
23 defendant to be arguing that they need more discovery
24 for that?

25 MS. SCHWAB: I do, and it's our position that

1 given the way the statute is worded, given the fact that
2 if you fail on Prong 2, if your usual course of business
3 is cleaning work, that's enough for us to get summary
4 judgment. We feel strongly that -- on the record that
5 was presented by the parties on summary judgment, that
6 was all the Court needs.

7 Your Honor, I just want to make one other point as
8 to the **Coverall** case, which I mentioned before. There
9 was a Coverall case at the SJC where the SJC ruled, as a
10 matter of law, that this so-called "franchisee" was an
11 employee. But also there is another Coverall case
12 pending before Judge Young --

13 THE COURT: There was a Coverall case pending
14 before me.

15 MS. SCHWAB: I know that individual case.

16 THE COURT: Well, it was a putative class
17 action.

18 MS. SCHWAB: It was. It ultimately got
19 settled out on an individual basis.

20 The Judge Young case -- the Coverall case that's
21 pending before Judge Young also has a motion for partial
22 summary judgment on the 148(b) claim and at a recent
23 hearing, where Judge Young heard that motion, he stated
24 on the record, um, that he was planning on issuing a
25 decision and attempted to grant that motion. The

1 decision hasn't come out yet, but that was Judge Young's
2 indication on the record on his review of a similar
3 issue in a nearly identical case.

4 THE COURT: And why shouldn't you be required
5 to give notice to the class and have people opt out
6 before summary judgment is decided?

7 MS. SCHWAB: Well, your Honor, I think given
8 that the issue before the Court is not do I throw out
9 this claim or does the claim go forward, but just
10 whether it's going to be a trial on liability and
11 damages or just on damages? And so I don't think it's
12 necessary for the Court or for us to go through the
13 class discovery and the op-out period at this time. I
14 think there may be --

15 THE COURT: Well, no, there wouldn't be class
16 discovery. Ordinarily you'd get class certification --
17 I mean, there wouldn't be what I think you're calling
18 "class discovery." You'd -- Judge Young certified the
19 class. Ordinarily if I certify a class, at the same
20 time I set up a schedule for the notice to go out and an
21 opt-out period, and then the parties are doing discovery
22 going toward trial and perhaps a motion for summary
23 judgment, but the people who are in the class know
24 they're in the class, they just don't have a ruling yet
25 on liability.

1 MS. SCHWAB: Right. Well, at this point,
2 before opt-out notice could go out, the judge would have
3 to decide the pending renewed motion for class
4 certification on the Chapter 93(a) claim to determine
5 the scope of the class.

6 THE COURT: Right.

7 MS. SCHWAB: Then notice would have to go out
8 to the class informing them of these two alternate
9 theories of recovery, one of which would potentially
10 moot out the other. Alternatively, the Court could
11 decide this one motion on liability and potentially do
12 away with having to decide those subsequent motions,
13 also potentially assuring a clearer and more
14 understandable notice to the class. And I think from a
15 case management perspective, this is a discretionary
16 decision that the Court can make about what makes more
17 sense in a particular case.

18 THE COURT: I agree with that, okay, that it's
19 my discretion and that's why we're doing it, I think.

20 Well, what would the defendant like to say on
21 this?

22 MR. van OORT: Thank you, your Honor. As you
23 can imagine, I disagree with many of the things that
24 Miss Schwab said.

25 If I may approach, we sketched out what we thought

1 an order of the events would be and it's very similar to
2 what your Honor specified. If I may approach? And we
3 can work off of this and we can give a copy of this to
4 you and give a copy to the plaintiff.

5 THE COURT: Okay. Do you have two of those by
6 any chance?

7 MR. van OORT: I do.

8 (Hands up.)

9 MR. van OORT: As we walk through here, your
10 Honor, we thought the order of the events would be
11 almost exactly what your Honor described, which is that
12 the first thing we ought to do is we have to figure out
13 what the class is and what claims are in it and who's in
14 it. To do that, we proposed deciding the Rule 93(a)
15 motion to dismiss and the motion for certification of
16 the 93(a) claims. There is also an issue regarding the
17 scope of the independent contractor employee class,
18 specifically whether it includes only franchise owners.
19 Also, that and --

20 THE COURT: Or franchisees and their
21 employees?

22 MR. van OORT: Yes. Yes. And that's an
23 issue. Your Honor, two of the other pieces of paper in
24 front of you address that. The second piece of paper
25 just sketches out what the contractual relationship

1 looks like.

2 The way the franchising works for Jani-King in
3 Massachusetts is that Jani-King of Boston enters into
4 franchise agreements with franchise owners, and you know
5 this from the other cases, and then those --

6 THE COURT: Two things. First of all, I can't
7 rely on what I know from other cases, because I think
8 they have different defendants and they may operate in
9 different ways. That's one. And, two, I have hundreds
10 of cases. I try to get emersed in things when I'm
11 deciding them, but you can't rely on my remembering many
12 months later exactly what was a feature of another case.

13 MR. van OORT: Point well taken, your Honor.

14 So in this case the way the structure of Jani-King
15 works is Jani-King of Boston sells franchises to people
16 who want to buy them and to operate a commercial
17 cleaning business and those franchise owners enter
18 contracts with Jani-King that provide a number of
19 things, including for some of the fees that you've heard
20 about, and providing that franchise owners have the
21 right to generate their own business for the franchise,
22 that they have the right to hire people to do the work
23 and to staff it as they please. Jani-King has no idea
24 who they hire or if they hire people or what the terms
25 of those agreements are and Jani-King doesn't supervise

1 them and Jani-King also doesn't pay those people.
2 Payroll is conducted by the franchise owner. They
3 operate like a business.

4 And so when the original motions for class
5 certification were filed, the plaintiffs' motion talked
6 expressly about the franchise owners and said their
7 argument is that as to those owners, you can decide the
8 prongs of the employment test just based on the
9 contracts. And so they talked about the owners and
10 Jani-King defended against the owners, and we've put
11 together, on the third sheet, just quotes from this.
12 Judge Young, we think, thought the class was limited to
13 owners, because that was the ground on which plaintiffs
14 argued that they could establish control on a class-wide
15 basis, is these contracts.

16 There is no named plaintiff who is not a franchise
17 owner. There is no briefing on whether or not a
18 franchise owner could state these claims. There was no
19 argument on whether they're common or any of those
20 things. And Judge Young doesn't discuss the nonowners
21 in his certification decision.

22 So we think the status right now is that it's
23 limited to owners. We don't know if plaintiffs intend
24 to try to push at that next step down to the people that
25 we don't know who they are.

1 THE COURT: Well, let's ask.

2 MS. SCHWAB: Sorry?

3 THE COURT: Are the employees of the
4 franchisees, in your view, in the class certified by
5 Judge Young or the class you aim to have me certify?

6 MS. SCHWAB: Well, your Honor, the definition
7 of the class that Judge Young set forth is a class of
8 all individuals who have performed cleaning work for
9 Jani-King in Massachusetts at any time since January
10 12th, 2004.

11 THE COURT: So does that include the employees
12 as well as the franchisees?

13 MS. SCHWAB: I believe that would include
14 anybody who's performing work at a Jani-King client.
15 So, yes, it -- you know, I'd just note that the
16 description by Jani-King's counsel of how the business
17 worked is not on the ground of how it works, but if
18 there's somebody who doesn't have a franchise contract,
19 but is cleaning for a Jani-King, and I do believe that
20 that would be encompassed in Judge Young's class
21 certification definition --

22 THE COURT: And is there any named plaintiff
23 who didn't have a franchise but cleaned for somebody who
24 did have a franchise?

25 MS. SCHWAB: No, all of the named plaintiffs

1 are people who have a direct franchise relationship with
2 Jani-King.

3 Um, your Honor, one alternative, picking up on
4 what I was discussing before in --

5 THE COURT: Well, I want to let him finish.
6 I'm just trying to clarify his position. You'll get --
7 I'll hear from you.

8 MS. SCHWAB: Okay.

9 MR. van OORT: Um, so to pick up the train of
10 thought in terms of the order of events, you know, we
11 thought you ought to decide the motion to dismiss, you
12 ought to decide the 93(a) certification, and it sounds
13 like there's an issue now as to the scope of the class,
14 so we ought to submit something to your Honor and decide
15 what the status of that is.

16 After that, as we outlined in our schedule and as
17 you initially summarized, we think there should be a
18 class notice and opt-out period, because our
19 understanding of the First Circuit law -- and it's not
20 just the First Circuit, it's the United States Supreme
21 Court and the district here, which says that you cannot
22 decide class-wide summary judgment until there's been
23 notice and a chance to opt out, because of the
24 unfairness.

25 THE COURT: It says you cannot or usually you

1 shouldn't?

2 MR. van OORT: Cannot. Here's the exception.

3 THE COURT: Which case says you cannot?

4 MR. van OORT: Here's the exception. The
5 First Circuit case that we cited and the **American Pipe**
6 Case, in our brief, they're both -- um, the First
7 Circuit case is **Pirkoff** and the Supreme Court case is
8 **American Pipe**.

9 There is one exception where courts have decided
10 summary judgment before class certification and that
11 situation is where one of the parties waives the right
12 to bind the class. That is, a defendant can say, "Your
13 Honor, I'd rather just move forward with summary
14 judgment and I agree I can't bind the class." So that's
15 what Jani-King has done with Mr. De Giovanni, the named
16 plaintiff. We've said, "He signed a release with us and
17 released all these claims," and so we'd prefer just to
18 move for summary judgment against him. And knowing --
19 we say that knowing that once we moved first, before
20 notice and opt out, we can't bind the class. We're done
21 as an individual thing.

22 And plaintiffs can make the same decision, they
23 can move early, but you waive the right to bind the
24 class, if you do that. And then you can't come back
25 later, after you've won, and say, "Okay, and now we're

1 going to do a class," later, because that's the
2 unfairness of the one-way intervention. Class members
3 can't sit on the sidelines and wait to find out whether
4 they've already won or lost on the merits and only then
5 decide whether they're in or out.

6 And that's why when Ms. Schwab was saying that
7 this situation is not a situation in which one-way
8 intervention is implicated, because we're just deciding
9 whether there's going to be liability or damages, that
10 that's precisely the situation where you can't do this,
11 because you can't decide liability first and then send a
12 notice to the class members saying, "Hey, guess what?
13 You've already won. Would you like to be part of the
14 class?" The class has to be able to win as well as
15 lose.

16 The two cases, your Honor, that the plaintiffs
17 cite for the proposition that you can do summary
18 judgment first, both of those cases -- and one is the
19 **Santana** case from this court and the other is the
20 **Ramirez** case from the District of Maine. But both of
21 those cases involve the situation I just outlined for
22 you where the defendant moved for summary judgment,
23 conceded that it was individual, and then once the
24 defendant won, the court denied class certification
25 because it was moot.

1 THE COURT: Hold on just a second.

2 (Pause.)

3 THE COURT: All right. I think there are a
4 few cases that the parties didn't cite that, um, are
5 relevant. I have to consider the implications of **One's**
6 **Waste Management Holdings**, 208 F. 3rd 288 at 298, Note
7 7, where the First Circuit noted that: "A delay in a
8 class certification ruling until after acting upon an
9 individual plaintiff's summary judgment motion raises
10 serious questions and urged district courts to exercise
11 caution before deciding to embrace that sequence,"
12 although "The Manual on Complex Litigation" discusses
13 doing that in certain circumstances. So I'll take a
14 look at it before I decide anything.

15 You know, whether it's imprudent or whether it's
16 impermissible are two different questions, and you're
17 telling me that I've been instructed that it's
18 impermissible in the circumstances of this case?

19 MR. van OORT: Your Honor, it's my
20 understanding -- and I'm not familiar with **Mobray** and
21 with "The Manual for Complex Litigation," and with the
22 cases cited there, but my understanding of the cases is
23 that courts have gone ahead with the plaintiff's side
24 motion for class-wide summary judgment, but only when
25 the defendant has consented to it or has waived

1 objections. The only other time that I'm aware of where
2 courts have proceeded with summary judgment first is
3 when it's a defendant conceding that it's just
4 individual.

5 Apart from that, I don't think there are cases
6 saying that it's permissible to do what the plaintiffs
7 are proposing here, which is to allow basically a free
8 shot on goal and decide the merits while the class
9 members sit out and review what happens. But your Honor
10 is right in terms of the way the courts have expressed
11 caution about that. But I think that's what you'll
12 find, and you may already have found, when you go
13 through the case law, that those are the two situations
14 where a defendant has conceded, like it sounds like the
15 defendant in *Jan-Pro* has here, or it looked like from
16 the docket they had, or where a defendant has moved and
17 they concede that it's individual.

18 So with that, I -- unless your Honor has further
19 questions on that, that seems to flesh out the notice
20 and opt-out issue.

21 THE COURT: Okay. Why don't you go ahead.

22 MR. van OORT: The other basis that we had
23 advanced for why the Court should defer decision on
24 class-wide summary judgment now is the Rule 56(f) basis,
25 and the basis of that is, as Ms. Schwab said, the

1 plaintiffs and the defendants agreed that we would not
2 conduct discovery into the merits of the class claims
3 until we had a ruling on class certification so we'd
4 know what if any claims were in and what the class was.
5 That was our agreement. So we haven't done that
6 discovery and we need it to oppose. And I'm not just
7 going to leave it vague like that. There are things
8 that we think are material to the test of Section 148
9 that Jani-King can usefully do and will do in this
10 discovery period.

11 If the class really does include all of our
12 franchise owners, we think we need to go and depose them
13 and get information from them showing the extent to
14 which they build their own businesses, um, including the
15 employees that they hire, and the terms and the
16 supervision. The fact that the franchise owners
17 themselves sometimes don't do any of the work, which
18 doesn't sound like an "employee," they delegate it out
19 and that's material in the control. The fact that they
20 have set up their business and done tax deductions as
21 businesses and deducted their payroll as business
22 expenses and their equipment and supplies as business
23 expenses. And the extent to which they control their
24 own businesses, that Jani-King is not there supervising
25 day-to-day, because Jani-King, frankly, your Honor,

1 doesn't have nearly enough employees to do that for the
2 hundreds of franchises it has. It would be impossible
3 for Jani-King to act like an employer usually acts and
4 supervise, and we can prove that by going and doing
5 discovery from these people. The proposed class,
6 depending on the time limit, would include between 300
7 and 400 franchisees.

8 Um, we, your Honor, would like to go out and will
9 plan to just sort of take discovery to show the
10 diversity within that. And Judge Young recognized that
11 even on the record he had, which wasn't conducted for
12 the full class, that showed a wide degree of diversity
13 among the franchise owners, and that's what we'd
14 establish.

15 Of course, if it turns out that workers are in the
16 class -- and we don't think they are, nobody has done
17 any discovery on that. There are no depositions, no
18 document requests, no interrogatories. Nothing. So we
19 would be starting completely from scratch on that and we
20 would need to do that.

21 So because that's the ordinary sequence of events
22 and because that's what Rule 56 perhaps provides, um, we
23 believe that the right sequence is exactly the one that
24 your Honor outlined at the beginning, which is now to
25 settle the class, do notice and opt out, do class

1 discovery, and then on the schedule that we've put
2 before you, and we have a red hash toward the end of the
3 discovery period where we think it would be appropriate
4 to order a mediation deadline after the parties have
5 been able to develop this, um, we're open to talking
6 with your Honor and with plaintiffs about what the right
7 structure of alternative dispute is and we think
8 mediation would be an appropriate way. Um, and after
9 that will come dispositive motions, your Honor, if
10 they're appropriate, and then a trial.

11 THE COURT: Is mediation or some effort to
12 settle premature now?

13 MR. van OORT: Your Honor, we have had
14 preliminary conversations with the plaintiffs, but they
15 have not proceeded beyond a conceptual stage and we
16 think that resolving the scope of the class and the
17 93(a) claims would really be helpful to this, and also
18 allowing us to proceed forward with the experts in the
19 fact discovery that we're seeking, to point out the
20 variety, because -- well, anyway.

21 Your Honor, we think that we would be better
22 served by proceeding forward with some fact development.

23 THE COURT: Okay.

24 MR. van OORT: May I address one thing, your
25 Honor, that Ms. Schwab said about the efficiency of

1 proceeding this way versus the other way?

2 THE COURT: Yes.

3 MR. van OORT: Ms. Schwab had said that if we
4 have to go ahead and do class discovery now, Jani-King
5 will have to produce all of the files for all like 400
6 people and do all of that. I don't see how that would
7 happen because I think, your Honor, that it's conceded
8 here that there are -- even though a class has been
9 certified, not all the issues are common issues. So
10 even after a class trial, there's going to be another
11 stage of proceedings where we're going to have to
12 resolve the individual issues.

13 In the plaintiffs' class certification brief, they
14 dropped a footnote and said this, they said, you know,
15 whether anybody actually worked overtime, whether they
16 were actually paid the minimum wage, and those are
17 individual things that are going to require discovery
18 and adjudication for every single person. And our
19 understanding, your Honor, and the way that I've seen
20 this happen before and I think it's the most efficient,
21 is that you go to trial on the class issues. Here if
22 the class continues, that will be the question of
23 whether they're independent contractors or employees.
24 And only and after you've resolved that, do you do the
25 individual discovery for all 400 people in all those

1 individual proceedings, if necessary, because if the
2 class trial turns out that they're independent
3 contractors, then you don't need to do that and we don't
4 want to do that.

5 And so for efficiency, this discovery period we've
6 focused just on the common issues and, you know, in
7 connection with the notice and opt out in 56(f) and we
8 think that's the right way to go at it.

9 MS. SCHWAB: Your Honor, um, I point out that
10 the schedule proposed by the defendant has everything
11 that the defendant wants to accomplish in the case,
12 including, first on the 93(a) claim, they ask that the
13 motion to dismiss be heard first. Although that raises
14 the exact one-way intervention issue that they're
15 claiming.

16 THE COURT: Well, I think it might be
17 necessary -- you know, my tentative view was that the
18 motion to dismiss was closely related to the motion for
19 class certification, it's sort of an expanded class on
20 93(a), so.

21 MS. SCHWAB: But, your Honor, I just want to
22 comment very briefly on one-way intervention because
23 clearly your Honor understands the state of the law and
24 we've talked back and forth on it.

25 The First Circuit doesn't have a lot of case law

1 on one-way intervention and there isn't any statement
2 out there that a court is not permitted to try cases as
3 is most efficient and makes most sense in that
4 particular case. And the **Pirkoff** case, as cited by the
5 defendant, as I explained in our brief, how that case
6 does not stand for the proposition the defendant says
7 that it does. But in any event, I'd like to point your
8 Honor more to the uniqueness of this case as opposed to
9 other cases that face class certification.

10 As I was explaining before, there are two
11 different tracks this case could go down on the
12 independent contractor misclassification claim. If your
13 Honor were to -- the class has already been certified.
14 There's a class certified on that claim. If your Honor
15 were to rule in our favor on summary judgment, as other
16 Massachusetts courts have done, the other motions
17 pending would be moot, they would not need to be decided
18 at all. The case would go forward on independent
19 contractor misclassification alone. I think that issue,
20 in this case, the fact that these claims are pled in the
21 alternative and the 93(a) claims would be dead if this
22 court determined that the Jani-King -- the people
23 performing the cleaning work for Jani-King were
24 employees under 148(b), that necessitates hearing that
25 issue first.

1 Also, as to the --

2 THE COURT: I don't think it necessitates it,
3 but you say it weighs in favor of it.

4 MS. SCHWAB: Yes, your Honor, it weighs in
5 favor of it.

6 THE COURT: Okay. But would the scope of
7 discovery be any greater if the 93(a) claims were in
8 or --

9 MS. SCHWAB: No, I believe that the scope
10 would be similar, although on the -- I'd just like to
11 point to the issue raised by the 56(f) issue. All of
12 the arguments the defendants were raising about the
13 information that they would attempt to elicit during
14 discovery go to Prong 1 or Prong 3 of 148(b). None of
15 them address the --

16 THE COURT: What is Prong 1?

17 MS. SCHWAB: Prong 1? I'm sorry. These are
18 just, um -- Prong 1 is the individual's free from
19 control and direction. And Prong 2 is the individual's
20 customarily engaged in an independently established --
21 no, that's Prong 3. Sorry. Is engaged in an
22 independently-established trade. Prong 2 is that the
23 work -- is that the service is performed outside the
24 usual course of business of the employer.

25 Prong 2 is all that we need in order to get

1 summary judgment. If the Court finds that the usual
2 course of business is the janitorial commercial cleaning
3 work that's provided by these franchisees, that's it,
4 you don't need to look at the control, you don't need to
5 look at how each individual franchisee structures their
6 cleaning --

7 THE COURT: Why -- has the defendant had any
8 discovery on that from the plaintiffs?

9 MS. SCHWAB: No, but there's no discovery that
10 the defendants --

11 THE COURT: No, there is. See, you say you're
12 happy to rely or you want to rely on their documents,
13 but their documents may not -- they're not happy to rely
14 on their documents. Their documents may not fully and
15 fairly describe everything and there may be information
16 the plaintiffs have that would at least put a material
17 fact on Prong 2 in dispute.

18 MS. SCHWAB: Well, but the question on Prong 2
19 is what is the usual course of business of Jani-King?
20 That's the only question on Prong 2.

21 THE COURT: No, you have to -- no. Read me
22 Prong 2, again, please.

23 MS. SCHWAB: "The service is performed outside
24 the usual course of business of the" --

25 THE COURT: Don't you have to know how the

1 employee or the franchisees work?

2 MS. SCHWAB: No, because the service is the
3 cleaning work. The service that the franchisees perform
4 is they do the cleaning. Their responsibility is to do
5 the cleaning. If that cleaning is in the usual course
6 of business of Jani-King, that's all that's required for
7 Prong 2. And what defense counsel was saying about the
8 information that they need about how they build their
9 businesses, who does the work, who doesn't, that all
10 goes to the issues of whether the individuals are free
11 from control or how these individual businesses work.
12 Now --

13 THE COURT: Is it the plaintiffs'
14 responsibility to prove all three prongs?

15 MS. SCHWAB: It's the defense's burden.

16 THE COURT: Oh, it's the defense's.

17 MS. SCHWAB: It's the company's burden to
18 prove that they satisfied all three prongs.

19 THE COURT: Okay.

20 MS. SCHWAB: Um, so, your Honor, because this
21 is such an unusual case where we have this one claim
22 that's already been certified that could dispose of all
23 the other outstanding motions --

24 THE COURT: Is there conceivably a kind of a
25 hybrid -- because, again, I'm trying to catch a moving

1 train. One, I could complete the class certification,
2 maybe next month, for example, if it's fully briefed,
3 and then, when I'm a little more emersed in this, decide
4 where to go from there. In other words, decide whether
5 any discovery is necessary or appropriate on Prong 2 and
6 whether it makes sense to, you know, address your motion
7 on Prong 2, as it's now written, or slightly revised,
8 before doing broader discovery.

9 MS. SCHWAB: Well, your Honor -- and I think
10 that the -- yes, that's possible, but the consensus is
11 that you could decide the 148(b) summary judgment motion
12 and moot out the other motions. I think the preferable
13 course would be to look at the summary judgment motion
14 now, or if the Court would prefer a more focused Prong 2
15 reconstruction of that motion, um, where the parties can
16 address -- you know, it would be our obligation to
17 present it as if we're relying only on Jani-King
18 documents and that's what we're relying on --

19 THE COURT: Because that's not the way it's
20 presented right now?

21 MS. SCHWAB: It is. It is already presented
22 relying on Jani-King's documents and we submit that
23 that's all that's necessary under all three prongs.
24 But, um, we think that the 148(b) -- that the
25 independent contractor issue should be flushed out ahead

1 of time.

2 I'm also concerned, from some of the comments
3 defense counsel has made, about the scope of discovery
4 that, from their point of view, discovery would be them
5 taking 20 to 30 depositions and that's it, and that's
6 not at all how we perceive the class discovery. The
7 class has been certified on the independent contractor
8 misclassification and there is class-based discovery
9 both including the scope of the fees that all the class
10 members have been charged, which would require
11 disclosure of the franchise files of the class members.

12 THE COURT: Well, at the moment the fees are
13 -- you say the fees should be in and the refunds is the
14 open issue?

15 MS. SCHWAB: Well, I'm saying both in the
16 independent contractor misclassification class, the
17 scope of damages would include being charged for work,
18 if you're an employee and you're paying money to do the
19 work, that that would be within the scope of the damages
20 for the class and that would be within the scope of
21 discovery that we would be entitled to within that class
22 period.

23 THE COURT: Would the defendant like to say
24 anything else, briefly?

25 MR. van OORT: Thank you, your Honor. I'll

1 just address the two things that were just talked
2 about.

3 Number 1, is the Prong 2, the outside the course
4 of business. As your Honor heard, the burden is on
5 Jani-King to prove that and we'd like the opportunity to
6 do class-wide discovery and put on our best proof on
7 that and that proof will include experts that talk about
8 the allocation of work in franchises. Because as I
9 understand plaintiffs' argument right now, they argue
10 that, of course, a McDonald's franchisee is in the same
11 line of business as McDonald's, the franchisor. They're
12 both in hamburgers. If that's all the analysis is, then
13 franchising just ceased existing in Massachusetts.

14 We don't think that's the analysis. We think the
15 analysis is, do the actual things that the franchisor
16 does, are they the same things as the franchise owner
17 does? And we'd like to develop the evidence to show
18 that they're not.

19 Here what Jani-King, the franchisor, does is it
20 develops a brand, it maintains that brand, it provides
21 administrative services. It does the other things to a
22 company that -- it does not itself have, as its ordinary
23 course of business, be cleaning buildings for other
24 people. That is what the ordinary course of business is
25 for the franchise owners. They clean. We sell

1 franchises. There's a difference between that. And we
2 would like the opportunity, through class-wide merits
3 discovery, to develop that, through depositions, um,
4 through testimony, on our side, documents on their side,
5 and through experts that explain how it works.

6 So I think there is a reason here not to single
7 out this one thing and do it in a piecemeal process,
8 which plaintiffs are proposing, but to have a unified
9 period of discovery.

10 THE COURT: Well, I'll ask you the same
11 question. Can I go -- May I go step by step? In other
12 words, let's say I determine next week, next month, um,
13 that I'm going to decide class certification and a
14 notice will go out and they'll be an opt-out period, and
15 then I might say to you, at that same hearing, "Where
16 should we go from here?" Should -- you know, should I
17 hear the argument and -- and maybe even the same day, on
18 this issue of whether I should decide the motion for
19 summary judgment on Prong 2 on a class-wide basis or
20 whether, under rule 56(f) that's premature?

21 MR. van OORT: Yes, your Honor, I certainly
22 think you may do that and we think -- we think the first
23 step you've identified, deciding the 93(a) motion to
24 dismiss under the renewed certification and then also
25 deciding whether these workers are in or out of the

1 class, that that's the right first step. And we
2 certainly can do that. We're prepared to come at your
3 next available date and address those things and decide
4 where we go from there.

5 THE COURT: Okay. I'm going to take a recess
6 and -- is there something you haven't said before?

7 MS. SCHWAB: I just want to say one thing,
8 which is that defense counsel's proposal is to bury us
9 in discovery and motion practice that may be unnecessary
10 in the face of some of the legal issues that --

11 THE COURT: I understand. But on the hybrid
12 approach that I just described, um, you get a chance,
13 beyond today, to argue that when I've studied the
14 underlying documents. To some extent you're further
15 ahead of me than you usually would be when I come in for
16 a hearing. But I'm trying to catch a moving train. So
17 --

18 MS. SCHWAB: I understand, your Honor.

19 THE COURT: And I will say that I am cognizant
20 of that, um, but I think, you know, all the civil rules
21 are being interpreted so you get a fair and efficient
22 resolution of the case. And, you know, you're not
23 making this argument -- it's not just sufficient to say
24 "This is David and Goliath, so the usual rules don't
25 apply," but that the defendants are entitled to some

1 discovery, if it's relevant.

2 We're going to take a recess. I'll be back.

3 (Recess, 3:00 p.m.)

4 (Resumed, 3:15 p.m.)

5 THE COURT: There are two things that I would
6 like to get clarified before I tell you how we're going
7 to proceed.

8 The defendant proposes that I hear next, in
9 connection with the class certification, the motion to
10 dismiss the Chapter 93(a) claims. If I did that, I
11 expect I would do it before the class certification and
12 if the defendant prevailed, it wouldn't be binding on
13 the class because people haven't had a chance to opt out
14 yet.

15 MR. van OORT: We concede that's correct, your
16 Honor.

17 THE COURT: Okay. And then I think the
18 plaintiffs told me that there were two Chapter 93(a)
19 theories that may not be dismissed with prejudice, but
20 there's no effort being made to get a class certified on
21 them, and that would be, I think, um, the 93(a) theories
22 for which Judge Young denied class certification with
23 prejudice, and those theories are that Jani-King offered
24 the plaintiffs a contract that it knew they could not
25 accept and that Jani-King's right to extend the initial

1 offering period is inherently unfair. That, I assume, I
2 would just leave, possibly even for after trial, the
3 class claims, if we had a trial on class claims.

4 MS. SCHWAB: That's correct.

5 THE COURT: Okay. Here's how we're going to
6 proceed. It's essentially where I left off. And I'll
7 talk to you about scheduling after I give you the
8 architecture of this, because I'm going to ask you, "Is
9 there further briefing that's required and how long will
10 that take?"

11 But I'm going to have a hearing at which I'm going
12 to address the defendants' motion to dismiss certain
13 93(a) claims first. If the motion to dismiss is
14 granted, and it's always my goal to decide these orally,
15 um, that that will be binding only on the individual
16 defendants.

17 Then I'm going to, um, have a hearing on the
18 motion to expand the certified class and determine the
19 scope of the Chapter 93(a) class claims, particularly
20 whether it will include what the plaintiff calls "the
21 fees claim." I don't believe there's a motion to
22 include the so-called "refund claim" and, at the moment,
23 there's no plaintiff who would adequately represent that
24 subclass. But my general understanding of class actions
25 is that the class can be redefined if it's fair and

1 there's a proper basis in the course of the litigation.
2 So we'll cross that bridge if and when we come to it.
3 So I would be focusing on the Chapter 93(a) fees claim
4 and whether it should be added.

5 I'll also have to, at that point, decide whether
6 the employees of the franchisees are in the class or not
7 in the class. I'll have to try to discern what Judge
8 Young intended. I will also have to -- well, I'll
9 consider whatever I need to consider.

10 All right. Once I decide the scope of the class
11 certification, a notice will need to go out, and I think
12 to expedite this, the plaintiff should be drafting and
13 submitting the proposed notice. You know, it's one of
14 two versions of the description of the class, one is if
15 you prevailed on a 93(a) fees claim and one is if you
16 didn't. And you should be discussing if the defendant
17 has some particular problem with the proposed notice,
18 see if you can get it resolved before that hearing.

19 And then at that hearing I would be prepared to
20 hear argument and would aim to decide whether -- not the
21 merits, but whether, as the plaintiff proposes, I should
22 schedule another hearing on the motion for partial
23 summary judgment on Prong 2 of the Chapter 148 claim or
24 whether, under Rule 56(f), the defendant should be
25 permitted to have some additional discovery on that

1 Prong 2 issue, or whether there should be even broader
2 discovery before I decide the merits of any of the
3 plaintiffs' potential 93(a) -- no, I'm sorry, motions
4 for summary judgment under 148.

5 Then I would decide the -- if I go ahead on a
6 motion -- to decide a motion for summary judgment, I
7 would do that after the end of the opt-out period, so
8 it's clear who's in the class and who's not in the
9 class. So you should think about what a -- what a
10 reasonable opt-out period is.

11 All right. So that's how we're going to proceed.
12 Then the question is -- the questions are: Does the
13 motion, the new motion for class certification, require
14 some additional briefing? I guess first from the
15 plaintiffs' perspective and then from the defendants'
16 perspective. And it seems to me that it may well
17 require more briefing particularly on the issue of
18 whether employees as well as so-called franchisees are
19 in the class.

20 MS. SCHWAB: Um, from the plaintiffs'
21 perspective, there is no additional briefing necessary
22 on that. On the 93(a) claim, the claims are grounded in
23 the contract and we're not intending that the class
24 would include people outside, other than franchisees.

25 THE COURT: Well, that's not what I understand

1 before. What about on the --

2 MS. SCHWAB: On employment misclassification,
3 we agree that, as to that issue, whether the employment
4 misclassification -- the scope of the employment
5 misclassification class may require additional briefing.

6 THE COURT: Okay. So that's the Chapter
7 148(b)?

8 MS. SCHWAB: That's right.

9 THE COURT: All right. Well, "may"? Because
10 you're going to have to -- okay, so that requires
11 additional briefing and, in a few minutes, I'm going to
12 ask you how -- you know, what's a reasonable time
13 schedule to get this polished up?

14 (Pause.)

15 THE COURT: And then you're also -- do you
16 want to brief further -- but it may be the defendant.
17 Well, do you want to brief further this issue of whether
18 the defendant should get any -- you know, whether I
19 should proceed on Prong 2 of Chapter 148(b) or whether
20 the defendant is entitled to any discovery or whether
21 there should be broader discovery before I hear any
22 motion for summary judgment?

23 MS. SCHWAB: It's our position that if -- when
24 your Honor reads the briefing on summary judgment, it
25 will be clear the lack of need for additional discovery

1 and to decide summary judgment on that.

2 THE COURT: And from the defendants'
3 perspective, um, the plaintiffs are going to do further
4 briefing on at least whether employees as well as
5 franchisees are in the class or should be in the class.
6 So do you want to respond to that?

7 MR. van OORT: Your Honor, I agree that the
8 right way to approach that is to have the plaintiffs
9 explain why they're in and, I guess, our position
10 depends on what your Honor is going to decide. If it's
11 just limited to deciding whether they're already in and
12 everybody's already thought about this and Judge Young
13 already did it, then I don't think we need any discovery
14 or anything on that, but if we're actually going to
15 decide whether a class of those workers meets the four
16 requirements of Rule 23(a), (1), (2), (3) and (4) and
17 whether it meets any of the requirements of 23(b), we
18 haven't had any discovery on that because we didn't know
19 that was here. And so I guess --

20 THE COURT: Well, that could be part of your
21 response, I think.

22 MR. van OORT: Yeah. So I'm happy to come
23 forth then and just do a responsive briefing to them,
24 without any discovery, and say, "We've done no discovery
25 and there are no facts before your Honor and no

1 plaintiffs and we think this is not part of the class,"
2 and we can do that just with a response in our brief.

3 THE COURT: Okay. And then --

4 MR. van OORT: On the Prong 2 issue?

5 THE COURT: Right.

6 MR. van OORT: Um, we'd like an opportunity
7 just to submit one paper, now that we're focused on that
8 and we're not distracted with the others.

9 THE COURT: Right. Okay.

10 MR. van OORT: We could put that in front of
11 you.

12 THE COURT: Well, that's -- I mean, my
13 inclination is to -- well, okay.

14 Here, how much time do the plaintiffs -- how much
15 time do the plaintiffs want to supplement the brief?
16 What's the minimum reasonable period of time? Two
17 weeks? Three weeks? Do you want more?

18 MS. SCHWAB: Three weeks, your Honor.

19 THE COURT: All right. So the plaintiffs are
20 going to supplement the briefing on the class
21 certification issues by March 23.

22 How long -- well, ordinarily the defendants would
23 have two weeks to respond. Is two weeks sufficient or
24 do you want another week?

25 MR. van OORT: Yeah, your Honor, if we could

1 have three weeks to respond to that brief, we would
2 appreciate it.

3 THE COURT: Okay. Your response will be due
4 April 13th.

5 And we'll plan to have a hearing on all of this on
6 May the 10th at 3:00.

7 (Pause.)

8 THE COURT: If the plaintiff's going to want
9 to file any kind of reply brief, it will need to be by
10 March -- it will need to be by April 20th.

11 All right. Then the defendants' -- what I'm
12 inclined to do is deny without prejudice the defendants'
13 motion for summary judgment with regard to certain
14 individual claims. It's just premature, I think.
15 Okay? So that's denied without prejudice.

16 Is there anything further that ought to be
17 discussed today?

18 MR. van OORT: Your Honor, there are two
19 things, I think. Number 1, you had mentioned that --

20 THE COURT: I'm sorry. I can't hear you.

21 MR. van OORT: Number 1, you had mentioned
22 that we could sort of submit a short paper on Prong 2.
23 We propose that that would be due the same time as the
24 plaintiffs' brief would be. So --

25 THE COURT: When you say -- oh, yeah,

1 actually, I -- oh, you want to do it the same time as --
2 yeah, good, this is helpful.

3 MR. van OORT: We could file that on March
4 23rd, your Honor?

5 THE COURT: Yes. Yes. Why don't you just use
6 the same schedule I gave you two.

7 MR. van OORT: Okay, we could do that.

8 THE COURT: Very good. Except the mirror
9 image. So you'll go first and then they'll go second.

10 MR. van OORT: Yes.

11 THE COURT: And you're going to get a written
12 order memorializing that.

13 MR. van OORT: Okay. And then, your Honor,
14 the other thing is, when you first talked, I thought I
15 heard you say that you were going to have a hearing
16 first on the motion to dismiss the 93(a) claims before
17 this later May 10th --

18 THE COURT: Well, it's going to be on the same
19 day.

20 MR. van OORT: Oh, okay.

21 THE COURT: I'll deal with both of them, but I
22 think I'll probably take up the motion to dismiss first,
23 so if I decide it -- let's say I dismiss those claims,
24 the dismissal is only binding on individual-named
25 plaintiffs.

1 MR. van OORT: That makes sense. That
2 clarifies that. I don't know of anything else that we
3 need to take up here, your Honor.

4 THE COURT: Okay?

5 MS. SCHWAB: Nothing from us, your Honor.

6 THE COURT: All right. And I'll work hard to
7 catch up with you.

8 Okay. The Court's in recess.

9 (Ends, 3:30 p.m.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
do hereby certify that the foregoing record is a true
and accurate transcription of my stenographic notes,
before Chief Judge Mark L. Wolf, on Monday, March 1,
2010, to the best of my skill and ability.

/s/ Richard H. Romanow 03-26-10

RICHARD H. ROMANOW Date